Supreme Court, U.S.
FILED

No. 091133 MAR 17 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

EUGENE DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 17, 2010

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QUESTION PRESENTED

In the context of exhaustion of remedies in a military board's administrative review, what constitutes a final administrative action?

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Petitioner, Eugene Davis, respectfully requests that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals was recommended for publication and codified 589 F.3d 861 (6th Cir. 2009), (Appendix A). The Opinion of the District Court, No. 06-2087 is not published (Appendix B).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 29, 2009.

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

"No person shall...be deprived of life, liberty, or property, without due process of law..."

Title 28 U.S.C. § 2401 (a) states in pertinent part:

"...Every civil action commenced against the United States shall be barred unless the

complaint is filed within six years after the right of action first accrues..."

STATEMENT OF THE CASE

The Plaintiff, Davis, was commissioned from the Army's Reserve Officer Training Program on May 15, 1977 (Second Amended Complaint, Docket Entry No. 8). Davis served on active duty from November 13, 1977 to January 14, 1985. (Id.) On June 22, 1981, Davis was promoted to Captain. (Id.) Davis then left active duty and was transferred to the Army's Reserve Control Group [RCG]. On April 14, 1989, Davis was promoted to Major. (Id.) On April 15, 1989, Davis was transferred to the Army's Selective Service System [SSS]. (Id.) On December 12, 1991, Davis was informed that due to a reduction in major positions in the SSS, he would not be retained and would be released into the RCG. At that time, Davis had more than fifteen years of qualifying service. (Id.) On October 13, 1993, Congress passed the Public Laws 102-484, known as TERA, which granted retirement benefits to field grade officers (majors and above) who had fifteen years of qualifying service who were separated from service between October 23, 1992 and September 10, 1995 (later changed to September 30, 1999). (Id.) On July 8, 1993, the Army announced this policy. Davis claims he never received notice of his right under TERA and continued to go to Reserve Drills for retirement points only until June 12, 1996. (Administrative Record, Docket Entry No. 19, p. 67)

On June 16, 1997, Davis submitted an application to the Army Board for Correction of Military Records [ABCMR]. (Id. pp. 63-78) On June 3, 1999, the ABCMR denied Davis' request because he did not

request a separation from the Selective Reserve Transaction Program [SELRES] or the Retired Reserves. (Id. p. 15) On November 27, 2000, Davis requested a reconsideration of this decision. (Id. p. 23) The ABCMR staff denied Davis' request for reconsideration on April 9, 2001. (Id. p. 23) On May 25, 2002, Davis filed another request for reconsideration. (Id. at p. 2) On July 29, 2003, the Army sent Davis a letter stating in pertinent part:

> "This constitutes exhaustion of your administrative remedies." (Id. at p. 1)[1]

Davis filed suit on February 9, 2006. Clearly within the six years statute of limitation. (Docket Entry No. 1)

The Effect of the Army's Determination

The Court of Appeals determined that the regulations outlining the structure and purpose of the Board's review were controlling on the issue of what is a final administrative action. The Court found that 32 C.F.R. § 581.3 (g) (4) (i)-(ii) required that Davis file for reconsideration within one year of the Board's original decision.[2] However, as the record clearly points out,

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[1] The Court of Appeals' opinion did not address this statement by the Army.

[2] 32 C.F.R. § 581.3 (g) (4) (i)-(ii) states:

> Reconsideration of [Board] decision. An applicant may request the [Board] to reconsider a Board decision under the following circumstances: (1) if the [Board] receives the request within 1 year of the [Board]'s original decision

the Board determined that Davis had not exhausted his administrative remedies until July 29, 2003. Davis filed suit on February 9, 2006.

There is a Split as to when a Claim is Exhausted among the various Courts of Appeals

The District Court in Washington, D.C. has held in Nivisher v. White, 211 F. Supp. 2d 125 (D.D.C. 2002) that the six year statute of limitation is tolled only if the application for reconsideration is filed with the Board within six years.

The Seventh Circuit has held in Soble v. Army Bd. Of Military Records, 151 F.3d 560 (7th Cir. 2003) that the statute begins to run at the time of the original Board decision.

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and if the [Board] has not previously reconsidered the matter, the [Board] staff will review the request to determine if it contains evidence (including, but not limited to, any facts or arguments as to why relief should be granted) that was not in the record at the time of the [Board]'s prior consideration. If new evidence has been submitted, the request will be submitted to the [Board] for its determination of whether the new evidence is sufficient to demonstrate material error or injustice. If no new evidence is found, the [Board] staff will return the application to the applicant without action. (ii) If the [Board] receives a request for reconsideration more than 1 year after the [Board]'s original decision or after the [Board] has already considered one request for reconsideration, then the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.

The Third Circuit has held in Green v. White, 319 F.3d 560 (3rd Cir. 2008) that a request for reconsideration could toll the statute of limitation only if the veteran claimed that new facts were the basis of the request.

The Sixth Circuit held in the case at bar, that the statute begins to run after a decision made by the Board on a proper request for reconsideration.

However, none of these Courts have determined whether or not the Board itself could waive the requirements of C.F.R. § 581.3 and determine when a claimant has exhausted his administrative remedies.

REASON FOR GRANTING WRIT

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT TAKE INTO CONSIDERATION THE BOARD'S INTERIM AUTHORITY TO INTERPRET AND ADMINISTER ITS OWN RULES

Davis comes before this Court complaining that the Court of Appeals' decision violates his due process rights. The Army Board for the Corrections of Military Records allowed him to file several requests for reconsideration and gave him a timely notice that he had exhausted his administrative remedies. At that point, Davis relied on the Board's determination and filed his complaint within the six year statute of limitations. The Board is a competent Federal Administrative Agency which has the authority to interpret its own rules and regulations and issue rulings fashioned by its rules. The Sixth Circuit,

respectfully, should have deferred to the Board's notice to Davis that his administrative remedies had been exhausted. At that point, the six year statute of limitation should have begun to run.

II.

THE QUESTION PRESENTED IS IMPORTANT

The question presented in this application is important because other military personnel may find themselves in the same position as Davis and continue to pursue their administrative remedies by relying on the Board's communications to them. The Board is in a superior position to Davis. Davis and other complainants should be able to rely on the Board's decision or guidance for the next step in pursuing their due process rights.

CONCLUSION

For the reasons set forth above, the Petitioner's Writ for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 09-5187

[Filed December 29, 2009]

EUGENE DAVIS, *Plaintiff-Appellant,*	)
v.	)
UNITED STATES OF AMERICA, *Defendant-Appellee.*	)

Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 06-02087—Jon Phipps McCalla, Chief District Judge.

Submitted: November 17, 2009

Decided and Filed: December 29, 2009

Before: MERRITT, CLAY, and McKEAGUE, Circuit Judges.

COUNSEL

ON BRIEF: Phillip Leon Davidson, Nashville, Tennessee, for Appellant. Monica M. DeGraffenreaid, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee.

OPINION

MERRITT, Circuit Judge. Eugene Davis, an Army veteran, claims that he was eligible for early retirement and extra pay in accordance with the Temporary Early Retirement Authority. *See* 10 U.S.C. § 1186 and § 1293. He appeals the District Court's dismissal of his claim as time-barred under the applicable six-year statute of limitations. *Davis v. United States*, No. 06-02087, slip op. at 9 (W.D. Tenn. Jan. 30, 2009). He contends that the Army Board for the Correction of Military Records ("Board") erroneously refused to correct his military record, a condition necessary for a valid application for early retirement. The issue before us is whether the accrual date for the statute of limitations is the date the Board first denied his application or its denial after he filed a request for reconsideration a year and a half later. We hold that a late-filed request for reconsideration does not toll the accrual date and affirm the District Court.

I. FACTS

The District Court adopted the following relevant facts:

> Plaintiff was commissioned from the Army's Reserve Officer Training Program on May 15, 1977. Plaintiff served active duty from November 13, 1977, to January 14, 1985. On June 22, 1981, Plaintiff attained the rank of Captain. Plaintiff subsequently left active duty and was transferred to the Army's Reserve Control Group. On April 14, 1989, Plaintiff was promoted to the rank of Major. On April 15, 1989, Plaintiff was transferred to the Army's Selective Service System. On December 12, 1991, Plaintiff was informed that due to a reduction in major positions, he would not be retained in the [Selective Service System]. On March 18, 1993, Plaintiff was released from the [Selective Service System] and returned to the [Reserve Control Group]. At this time, Plaintiff had more than fifteen years of qualifying service. Plaintiff was issued a statement by the Army stating that he completed fifteen years of qualifying service for retirement pay as of May 14, 1992.

Davis, slip op. at 2 (internal citations omitted).

Davis applied to the Board for the correction of his military records on June 16, 1997. *Id.* at 3. The Board denied his request on June 3, 1999. *Id.* Regulations require the filing of any request for reconsideration within one year of the Board's action.[1] Approximately

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[1] 32 C.F.R. § 581.3(g)(4)(i)-(ii) states:

> Reconsideration of [Board] decision. An applicant may request the [Board] to reconsider a Board decision under the following circumstances: (i) if the [Board] receives the

a year and a half later, on November 27, 2000, Davis applied for reconsideration of the Board's decision. (Br. for Appellant at 5.) The Board denied Davis' request for reconsideration on April 9, 2001, citing a lack of new evidence. *Davis*, slip op. at 7. Davis subsequently brought this suit in the District Court for the Western District of Tennessee on February 9, 2006. *Id.* at 9. The District Court found that Davis' suit was time-barred because more than six years had elapsed since the Board reached its original decision. *Id.*

In this case the Government expressly waived oral argument, and Davis did not request oral argument in his brief. Therefore, we decide this case on the briefs alone.

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request within 1 year of the [Board]'s original decision and if the [Board] has not previously reconsidered the matter, the [Board] staff will review the request to determine if it contains evidence (including, but not limited to, any facts or arguments as to why relief should be granted) that was not in the record at the time of the [Board]'s prior consideration. If new evidence has been submitted, the request will be submitted to the [Board] for its determination of whether the new evidence is sufficient to demonstrate material error or injustice. If no new evidence is found, the [Board] staff will return the application to the applicant without action. (ii) If the [Board] receives a request for reconsideration more than 1 year after the [Board]'s original decision or after the [Board] has already considered one request for reconsideration, then the case will be returned without action and the applicant will be advised the next remedy is appeal to a court of appropriate jurisdiction.

II. ANALYSIS

A claim against the United States can only be brought "six years after the right of action first accrues." 28 U.S.C. §2401(a). When did Davis' claim accrue for purposes of the six-year statute of limitations? Accrual of the claim turns on whether Davis should have exhausted his military administrative remedies prior to bringing a claim in federal court, and, if so, at what point is the military administrative process exhausted.

A. EXHAUSTION OF REMEDIES

First, we must determine whether Davis must exhaust his administrative remedies. The District Court framed this question by asking whether a claim accrues at the date of discharge or at the date when a veteran exhausts his or her military remedies. *Davis*, slip op. at 6. Noting there is a split of authority on this issue, the District Court held that even under the most liberal standard, Davis' claim would be time-barred. *Id.* at 6.

The District Court correctly noted that some courts, including the Federal Circuit, have held, depending on the nature of the cause of action, that the accrual date is the date of discharge or separation. *Boswell v. United States*, 83 F. App'x 313 (Fed. Cir. 2003). But the majority of courts, either explicitly or implicitly, have rejected the notion that the accrual date is the date of discharge and have required exhaustion of remedies before the Board. *See Green v. White*, 319 F.3d 560 (3d Cir. 2003); *Soble v. Army Bd. of Corr. of Military Records*, 151 F.3d 1033 (7th Cir. 1998); *Smith v. Marsh*, 787 F.2d 510, 512 (10th Cir. 1986); *Geyen v.*

Marsh, 775 F.2d 1303, 1309 (5th Cir. 1985); *Nivisher v. White*, 211 F.Supp. 2d 125, 129 (D.D.C. 2002); *Smalls v. United States*, 87 F. Supp. 2d 1055 (D. Haw. 2000).

Additionally, in this Circuit, there appears to be some confusion among federal courts as to the effect of a military administrative review process on the six-year statute of limitations. *Compare Seepe v. Dep't of the Navy*, 518 F. 2d 760, 762 (6th Cir. 1975) (holding that statute of limitations was tolled until the veteran exhausted his military administrative remedies) *and Upsher v. United States*, No. 97CV75738, 1998 U.S. Dist. LEXIS 17156 (E.D. Mich. Sept. 25, 1998) (holding action to modify records does not accrue until final board decision) *with McDonald v. Resor*, No. 94CV5039, 1994 U.S. App. LEXIS 21597 (6th Cir. Aug. 10, 1994) (accrual date is date of discharge) *and Gibbs v. Dep't. of the Army*, No. 07 CV124-R, 2008 U.S. Dist. LEXIS 34673 (W.D. Ky. Apr. 28, 2008) (accrual date is date of discharge). We will attempt to clear up some of this confusion.

The claim in this case concerns both Davis' right to early retirement and the refusal of the Board to correct Davis' military record permitting him to receive this retirement. It appears from the record that Davis cannot be awarded early retirement benefits absent a correction of his military records. The Board denied Davis' request for correction of his military records on June 3, 1999. His claim first accrued on that date. However, consistent with the majority view, we hold that the running of the six-year period of limitations was tolled during the pendency of any legitimate exhaustion efforts.

B. FINAL ADMINISTRATIVE ACTION

The next issue is when the claim is considered exhausted. The key inquiry is what constitutes final administrative action in this context. Davis argues that the Board's decision was not exhausted and, therefore, not final until the request for reconsideration was denied. Courts are split on this issue, and the decisions have varied widely.

Some courts have found that the statute of limitations is tolled only if the application for reconsideration is filed with the Board within six years. *Nivisher*, *supra*, 211 F. Supp. 2d at 129. This approach incorporates the six-year statute of limitations into the administrative process. But, as mentioned above, the regulations which govern the Board only provide a one-year window to petition the Board for reconsideration. *See* 32 C.F.R. § 581.3(g)(4)(i)-(ii). Adopting an approach that validates a suit so long as the request for reconsideration was filed within six years undermines the plain language of the regulations and would leave the issue up-in-the-air too long. Further, it is unclear what happens if the veteran waits five years and 364 days to file for reconsideration. Does he then only have one day to file a suit in district court if he receives an adverse decision? This is not a good approach.

Other courts have held that the statute begins running at the time of the original Board decision, and an application for reconsideration has no effect on the six-year statute of limitations. *Soble*, *supra*, 151 F.3d 1033. This approach fails to consider that the regulations explicitly allow for a veteran to file for reconsideration with the Board.

The Third Circuit has held that a request for reconsideration could toll the statute of limitations only if the veteran claimed that new facts were the basis for the request. *Green, supra*, 319 F.3d 560. This approach could lead to unpredictability for the veteran who must risk running afoul of the statute when submitting a request for reconsideration. Further, the regulations speak directly to requests that only contain evidence that was previously in the record. 32 C.F.R. § 581.3(g)(4)(i)-(ii). The regulations direct the Board to return these requests, without opinion, and instruct the veteran to appeal to the court with appropriate jurisdiction. *Id.* Whether a request contains new facts or law may be a complex question for the Board to decide and does not serve as a clear criterion for tolling.

None of the above decisions take into account the regulations outlining the structure and purpose of the Board's review. As mentioned above, the regulations allow for a veteran to apply for reconsideration within one year of the original Board decision. *Id.* This means that so long as a veteran petitions the Board for rehearing within one year of the date of a prior adverse decision, the veteran is still legitimately pursuing administrative remedies. For this reason, we hold that the statute of limitations is tolled during the processing of a timely request for reconsideration, but we note that this holding does not require a veteran to request reconsideration of the original Board decision in order for his or her claimto be considered exhausted. A claim will be considered exhausted either after the Board's original decision, if there is no request for reconsideration, or after a denial of a timely request for reconsideration. This choice is in the hands of the

veteran, because the regulations allow him both avenues for appeal.

Drawing an analogy to habeas corpus review, the time that a prisoner properly spends appealing his conviction in state post-conviction review or any other collateral review does not count toward the one-year statute of limitations for habeas review. We have held that an inmate's timely motion for rehearing in state court tolls the statute of limitations for habeas review. *Sherwood v. Prelesnik*, 579 F.3d 581, 587 (6th Cir. 2009) (requiring that the motion be timely in accordance with state rules). We see no reason to apply a different rule here.

In sum, so long as a party is properly and in a timely fashion pursuing exhaustion of administrative remedies, the statute of limitations is tolled. The regulations, and consequently this Court, do not require the veteran to request reconsideration. When a veteran chooses to forego reconsideration, the statute runs from the date of the original Board decision. But if the veteran chooses to exercise the regulatory right to bring a timely administrative appeal, then the statute is tolled during that period.

Applying the articulated rule to the facts of this case, we hold that Davis' claim is time-barred. The key fact is that Davis did not apply for reconsideration within the one year required by the regulations. Because Davis did not raise his petition for rehearing to the Board until after the time allotted by the regulations, he was not legitimately still pursuing military administrative remedies. Consequently, the Board reached its final decision on Davis' appeal on June 3, 1999 – the day that it denied his request to

correct his military record. By waiting until February 9, 2006, to institute this action, Davis failed to bring suit within the six-year statute of limitations required by 28 U.S.C. § 2401(a).

Because Davis' claim is time-barred, we pretermit other issues.

Accordingly, the judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-1173

[Filed December 29, 2009]

EUGENE DAVIS,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant - Appellee.	)
	)

Before: MERRITT, CLAY, and MCKEAGUE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was submitted on briefs without oral argument.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the District Court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

No. 06-2087 JPM-tmp

[Filed January 30, 2009]

EUGENE DAVIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Before the Court is Defendant United States of America's ("Defendant") Motion to Dismiss, and in the Alternative, for Summary Judgment (Doc. 20), filed March 11, 2008. Plaintiff Eugene Davis ("Plaintiff") responded in opposition to Defendant's motion on April 10, 2008. (Doc. 24). Defendant filed a reply in support of its motion on April 18, 2008. (Doc. 30). This Court

held a telephonic hearing on Defendant's motion on May 14, 2008. Counsel representing Plaintiff was Phillip Davidson, Esq. Counsel present for Defendant was Monica DeGraffenreaid, Esq. For the following reasons, Defendant's Motion to Dismiss is GRANTED.

I. Background

This case arises out of Plaintiff's service in the United States Army ("Army") and the United States Army Reserves, an agent of Defendant. Plaintiff was commissioned from the Army's Reserve Officer Training Program on May 15, 1977. (Second Am. Compl. ¶ 1.) Plaintiff served active duty from November 13, 1977 to January 14, 1985. (Id.) On June 22, 1981, Plaintiff attained the rank of Captain. (Id. at 2.) Plaintiff subsequently left active duty and was transferred to the Army's Reserve Control Group ("RCG"). (Id.) On April 14, 1989, Plaintiff was promoted to the rank of Major. (Id.) On April 15, 1989, Plaintiff was transferred to the Army's Selective Service System ("SSS"). (Id.) On December 12, 1991, Plaintiff was informed that due to a reduction in major positions, he would not be retained in the SSS. (Id.) On March 18, 1993, Plaintiff was released from the SSS and returned to the RCG. (Id.) At this time, Plaintiff had more than fifteen years of qualifying service. (Id.) Plaintiff was issued a statement by the Army stating that he completed fifteen years of qualifying service for retirement pay as of May 14, 1992. (Id.)

Plaintiff contends that pursuant to the Temporary Early Retirement Authority ("TERA") contained in 10 U.S.C. § 1186 and § 1293 he was qualified for early retirement as of October 13, 1993. (Mem. in Supp. of the Pl.'s Opp'n to Def.'s Mot. to Dismiss or in the

Alternative Summ. J. ¶ 2.) Plaintiff further contends that he was never notified of his right to apply for early retirement and that he continued to drill for points until June 12, 1996. (Id.) On June 16, 1997, Plaintiff contacted the Army Board for the Correction of Military Records ("ABCMR") to request that his military record be corrected so that he could apply for early retirement. (Id.) The ABCMR denied Plaintiff's request on June 3, 1999, stating that Plaintiff had not requested separation from the Selective Reserve Transition Program, the early qualification requirement, nor had Plaintiff transferred to the Retired Reserves. (Id.)

Plaintiff commenced this action against Defendant on February 9, 2006 to obtain retirement benefits. Plaintiff alleges federal question jurisdiction under 28 U.S.C. §§ 1331, 1343. (Second Am. Compl. ¶ 1.) Defendant moves to dismiss for lack of subject matter jurisdiction on three grounds: (1) that Plaintiff has failed to plead and/or prove a valid jurisdictional basis for his claim; (2) that Plaintiff's claim is time barred; and (3) that the relief Plaintiff requests is a nonjusticiable military personnel issue. The Court will consider Defendant's grounds for dismissal in turn.

II. Standard of Review

A. Rule 12(b)(1) – Subject Matter Jurisdiction

Lack of subject matter jurisdiction is an affirmative defense that a defendant may assert in a motion to dismiss. See Fed. R. Civ. P. 12(b)(1); In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993) (emphasizing that to survive a motion to dismiss, a complaint must contain "either direct or inferential

allegations respecting all the material elements to sustain a recovery under some viable legal theory"). The party opposing dismissal has the burden of proving subject matter jurisdiction. See Moir v. Greater Cleveland Reg'l Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). "A Rule 12(b)(1) motion can either attack the claim of [subject matter] jurisdiction on its face . . . or it can attack the factual basis for [subject matter] jurisdiction. . . ." DLX, Inc. v. Ky., 381 F.3d 511, 516 (6th Cir. 2004).

III. Analysis

Plaintiff alleges that because he was involuntarily separated after completing fifteen years of quality service he is entitled to retirement benefits pursuant to 10 U.S.C. §§ 1186, 1293. Defendant moves to dismiss, or in the alternative, for summary judgment as to Plaintiff's claim.

A. Failure to Plead a Valid Jurisdictional Basis

Defendant moves to dismiss Plaintiff's Complaint for failure to plead a valid jurisdictional basis. Defendant's argument is based on Plaintiff's Amended Complaint, which relies on the Tucker Act as a jurisdictional basis for his claim.[1] Defendant argues that because Plaintiff is seeking only record corrections and not monetary damages, this Court

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[1] Under the Tucker Act, the district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims in cases where a Plaintiff seeks non-tort monetary claims against the United States. See 28 U.S.C. §§ 1346, 1491.

lacks jurisdiction to hear this case under the Tucker Act. Since the filing of the instant motion, Plaintiff has filed a Second Amended Complaint. This Court will therefore consider Plaintiff's Second Amended Complaint against Defendant's motion.

Plaintiff's Second Amended Complaint asserts Federal Question jurisdiction under 28 U.S.C. §§ 1331 and 1343 by alleging that the claim arises from direct violations of 10 U.S.C. § 1552. Title 10 U.S.C. § 1552 states in pertinent part that "[t]he Secretary of a military department may correct any military record . . . to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Without making a determination on the merits of Plaintiff's claim, the Court finds that Plaintiff has properly alleged a Federal Question and has therefore pled a valid jurisdictional basis.

B. Timing of Complaint

In addition to arguing that Plaintiff failed to establish a jurisdictional basis for his claim, Defendant argues that Plaintiff's claim is time barred pursuant to 28 U.S.C. § 2401(a). Under 28 U.S.C. § 2401, a claim against the United States brought in district court is barred "six years after the right of action first accrues." 28 U.S.C. § 2401(a). There is considerable disagreement among courts as to when a right of action against the Army for wrongful discharge "first accrues." While some courts have held that a claim accrues upon the date of discharge (See, e.g. June v. Sec'y of the Navy, 557 F. Supp. 144, 149 (M.D. Pa. 1982) (citing Nelson v. Miller, 373 F.2d 474, 479 (3d Cir. 1967)), others have taken a more liberal view, holding that the six-year statute of limitations is tolled until a plaintiff exhausts his or her administrative

remedies. See Von Hoffburg v. Alexander, 615 F.2d 633, 637 (5th Cir. 1980); Bard v. Seamans, 507 F.2d 765, 769 (10th Cir. 1974).

Plaintiff was released from the SSS on March 18, 1993. He applied to the ABCMR for correction of his military record for the first time on June 16, 1997. The ABCMR denied his request on June 3, 1999. Plaintiff later requested that the ABCMR reconsider its June 3, 1999 decision. This request was denied on April 9, 2001. Plaintiff filed his initial Complaint with this Court on February 9, 2006.

By application of even the most liberal standard of when a right of action "first accrues," Plaintiff's right of action began to accrue on June 3, 1999, the date his request for correction of his military record was denied. The six-year statute of limitations afforded plaintiffs under 28 U.S.C. § 2401(a) would therefore have expired on June 3, 2005, eight months before Plaintiff filed his initial Complaint with this Court.

Plaintiff argues that the statute of limitations was tolled until the ABCMR reached a final decision. Specifically, Plaintiff argues that the ABCMR's decision was not final until the request for reconsideration was denied on April 9, 2001.

Plaintiff relies on Upsher v. Sec'y of the Army to support his position that the April 9, 2001 denial of his request for reconsideration provided a new accrual date. Upsher, however, does not support Plaintiff's argument. In Upsher, the plaintiff was issued an "Undesirable Discharge" on May 11, 1973. Upsher v. Sec'y of the Army, 1998 U.S. Dist. LEXIS 17156 at *3 (E.D. Mich. Sept. 25, 1998). On September 14, 1977,

Upsher filed an application with the Army Discharge Review Board ("ADRB") to have his Undesirable Discharge changed to a "general" discharge. Id. at *4. Upsher's application was subsequently denied. Id. On September 16, 1993, Upsher applied to the ABCMR to have his military records corrected to reflect that he received a "medical discharge" from the Army. Id. The ABCMR denied Upsher's request on January 3, 1997. Id. Upsher filed suit in the District Court on January 6, 1998. Id.

The Court in Upsher held that an action to modify military records does not "accrue" for the purposes of 28 U.S.C. § 2401(a) until the highest administrative review board, the ABCMR, makes a final decision. Id. at 13. The Court held that the ABCMR's final decision was made on January 3, 1997 when it denied Upsher's request to have his discharge upgraded. Id.

Upsher, unlike the Plaintiff in the case at bar, submitted only one request to the ABCMR before filing suit. The Court held that the cause of action began to accrue on the date the ABCMR denied his request. The record in Upsher does not indicate that the plaintiff submitted a request for *reconsideration* of an ABCMR decision, as Plaintiff did in this case.

Because Plaintiff did not file his initial Complaint until February 9, 2006, eight months after the six-year statute of limitations had run, his claim is time-barred. Defendant's Motion to Dismiss is therefore GRANTED.

Having found that Plaintiff's claim is time-barred, the Court does not address whether Plaintiff's claim is

a nonjusticiable military personnel issue as asserted in Defendant's motion.

SO ORDERED this 30th day of January, 2009.

/s/ JON PHIPPS MCCALLA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF TENNESSEE
WESTERN DIVISION

No. 06-2087 JPM-tmp

[Filed January 30, 2009]

EUGENE DAVIS,	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant.	)
	)

JUDGMENT

JUDGMENT BY THE COURT. This action having come before the Court on Defendant's Motion to Dismiss (Doc. 20), entered March 11, 2008,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, in accordance with the Order Granting Defendant's Motion to Dismiss, entered January 30, 2009, this case is dismissed in its entirety with prejudice.

APPROVED:

S/ JON P. McCALLA

UNITED STATES DISTRICT COURT

January 30, 2009
Date